EXHIBIT C

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-99000-smb

- x

In the Matter of:

BERNARD L. MADOFF,

Debtor.

- x

Adv. Case No. 09-01503-smb

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

MADOFF et al,

Defendants.

- x

Adv. Case No. 08-01789-smb

- x

SECURITIES INVESTOR PROTECTION CORPORATION

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC et al,

Defendants.

- x

Adv. Case No. 10-04891-smb

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

THE ROBERT AUERBACH REVOCABLE TRUST, THE JOYCE C. AUERBACH REVOCABLE TRUST, ROBERT AUERBACH, individually, and JOYCE C. AUERBACH, individually, as Trustee of the Robert Auerbach Revocable Trust, and as Trustee of the Joyce C. Auerbach Revocable Trust,

Defendants.

- x

Adv. Case No. 10-04918-smb

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

Ellen Bernfeld,

Defendant.

- x

- x

Adv. Case No. 10-04283-smb

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

STEVEN MENDELOW et al,

Defendants.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, NY 10004

February 24, 2016

10:16 AM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

Hearing re: Chambers Conference, Adv. Case No. 09-01503-smb

Hearing re: Motion to Allow Customer Claim of Aaron Blecker, Adv. Case No. 08-01789-smb

Hearing re: Trustees Motion and Memorandum to Affirm His Determinations Denying Claims of Claimants Holding Interests in Black River Associates LP, MOT Family Investors, LP, Rothschild Family Partnership, and Ostrin Family Partnership, Adv. Case No. 08-01789-smb

Hearing re: Final Pre-Trial Conference, Adv. Case No. 10-04891-smb

Hearing re: Discovery Conference Pursuant to Local Bankr. R. 7007-1(b), Adv. Case No. 10-04918 (also applies to Adv. P. Nos. 10-5143 & 10-4841)

Hearing re: Trustee's Motion for Leave to Amend, Adv. Case No. 10-04283-smb

Hearing re: Discovery conference pursuant to Local Rule Bankruptcy 7007-1(b), Adv. Case No. 10-04283-smb

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

CHAITMAN LLP
Attorney for Blecker
465 Park Avenue
New York, NY 10022

BY: HELEN DAVIS CHAITMAN, ESQ.

BAKER HOSTETLER
Attorney for the Trustee
45 Rockefeller Plaza
New York, NY 10111

BY: SEANNA BROWN
GEORGE KLIDONAS
NICHOLAS J. CREMONA
DEAN D. HUNT
FARRELL A. HOCHMUTH
JONATHAN B. NEW
ROBERTSON D. BECKERLEGGE

SECURITIES INVESTOR PROTECTION CORPORATION
1667 K Street, N.W., Suite 1000
Washington, DC 20006

BY: KEVIN H. BELL

PRYOR CASHMAN LLP
Attorney for Patrice M. Auld, et al, (indiscernible)
Defendants
7 Times Square
New York, NY 10036

BY: RICHARD LEVY, JR.

FOLKENFLIK & MCGERITY LLP
Attorney for Auerbach Trust, et al
1500 Broadway
New York, NY 10036

BY: MAX FOLKENFLIK

WEDEEN & KAVANAGH
Attorney for 4041, 4981, 8514
41 Union Square West, Suite 325
New York, NY 10010

BY: TIMOTHY WEDEEN, ESQ.

AKIN SOLBAKKEN LLP
Attorney for Mendelow et al
750 Lexington Avenue, 25th Floor
New York, NY 10022

BY: ALEX REISEN
STANLEY ARKIN

P R O C E E D I N G S

THE COURT: Go ahead.

MS. CHAITMAN: Good morning, Your Honor. Helen Davis Chairman on behalf of Aaron Blecker. Mr. Blecker is 104 years old and he has been waiting since 2009 for the trustee to fulfill his statutory obligation to pay SIPC insurance.

We know from Bernard Madoff's declaration what we know from basic common sense, an investment advisor does not send a customer a check unless the customer asks for the check and does so in writing. Mr. Madoff attests to the fact that he kept all such records and indeed the trustee has such records and has produced letters from customers asking for profit withdrawals --

THE COURT: Can I ask you a question? Are you asking for a hearing or are you asking for determination today that he's entitled to payment of his claim.

MS. CHAITMAN: I think that there's no factual dispute in the record. There is not a single issue in dispute because, number one, while the trustee says that Mr. Madoff is not credible, he hasn't put in an affidavit from --

THE COURT: But Mr. Madoff's affidavit, even by a creditor is hearsay. How can I grant a motion like that on a hearsay affidavit?

MS. CHAITMAN: Mr. Picard has letters that customers have written asking for withdrawals. There is no evidence that Mr. Blecker ever asked for a withdrawal. You have to --

THE COURT: Can I ask you a question? One thing I can't figure out the trustee has raised. He testified at his deposition, which I read, that he never took any money out of this account because it was such a great investment. He leaves the money in there for between I think 15 and 5 years depending on -- and then at the end of the day he pulls out $206,000. He could have gotten more in a savings account at today's rates.

MS. CHAITMAN: Well, it's very interesting, Your Honor, because when the trustee raised that issue I then happened to look at the latest expert report that the trustee has submitted on the assumption that he loses and that Your Honor holds that the profit withdrawals, that there's no documentary evidence for such as Blecker have to be paid.

And in that report, the trustee's expert calculates that the amount due to Mr. Blecker on this very account is $558,868.

THE COURT: I thought on this account, the 22 account everything was transferred out.

MS. CHAITMAN: No, it's BO56. But they were all -

- they were transferred between them.

THE COURT: So the expert says that he's entitled to $586,000?

MS. CHAITMAN: $558,868. So that I think explains the whole thing. Now, we don't have access to those records. But the things that are not in dispute, Your Honor, and they won't be in dispute, there is not a single piece of paper in the trustee's possession which indicates that Mr. Blecker ever requested a withdrawal.

THE COURT: I understand that. But according to the expert, trustee's expert report, if you went back 10 years -- and I realize Mr. Blecker's so-called profit withdrawals were before then, the expert has been able to correlate nearly 100% that every profit withdrawal was documented by other evidence that indicates that it was actually in some sort of withdrawal distribution.

And I guess the trustee is asking me to extrapolate those findings back to the beginning when maybe the records aren't that good or maybe there are no records, I don't know, or maybe the records -- there were records that were lost and say that every time you see profit withdrawal it's a withdrawal. Why is it that some evidence creates an issue effect?

MS. CHAITMAN: It's not evidence and I'll tell you why. If you look at that same expert report, what the

expert said was if I take the period only from before December 1998 when there was a different trading strategy, this phenomenon of Check AT&T $1314.03, that phenomenon stopped in 1998. There were no profit withdrawals of that kind.

What the trustee's expert did was say, well, we have different kinds of withdrawals. Yes, if a customer writes a letter and says please send me $10,000 a month, those correlated to checks to the customer. But in the period prior to 1998 before they had the bank records, that very trustee said all I can do is confirm 50%. With respect to Blecker I can't confirm a single one. And of that 50%, Your Honor, the report has this many charts for each account.

THE COURT: Counsel is showing me about six inches.

MS. CHAITMAN: Oh, sorry. Thank you. And of that, three and a half inches is normally (indiscernible). So of the pre-1998 profit withdrawals, more than half of them are Madoff's co-conspirator with whom Madoff was exchanging billions of dollars on a daily basis. So ultimately, there's essentially no evidence that the trustee has and this -- as I -- you know, from the cases I cited, Your Honor, you don't establish a fact through a statistical analysis because we all know, and it's proven by what

happened here just as Your Honor misunderstood the report, the statistician who's paid to do something can play with numbers and come up with everything.

THE COURT: (indiscernible) expert witness.

MS. CHAITMAN: I agree with you. We don't need an expert witness. This is not a question of expert testimony. Mr. Blecker was deposed. The trustee had every opportunity to challenge him. He was 102 at the time he was deposed. The trustee couldn't shake him. We have no evidence whatsoever.

We have the fact that right after this trading strategy -- God knows what it was -- there was never a withdrawal by Mr. Blecker even though he was aging. So all of the evidence that can ever be adduced proves that he never took out any money and the trustee can't -- there's nothing in SIPC which allows a trustee to deny to someone where the evidence and the books and records prove that the customer never took a withdrawal.

THE COURT: Thank you.

MS. BROWN: Your Honor, Seanna Brown on behalf of the trustee. Your Honor, I think Ms. Chaitman's argument demonstrates why this court should adhere to the profit withdrawal schedule that ordered last June.

She's arguing the merits of our expert reports and what factual disputes exist. And the court should evaluate

those arguments on the basis of a full record, which is precisely what the profit withdrawals order.

THE COURT: Can I ask a question?

MS. BROWN: Yes.

THE COURT: You're going through this exercise of getting experts. Has anyone taken the deposition of a person who worked the Madoff Securities and might know what these profit withdrawals mean?

MS. BROWN: We have not taken any depositions. We have evaluated the books and records of Madoff, including the house -- excuse me, the BLMIS manual that relates to the computer system through which these transactions were recorded. And that brings me to one point I do want to emphasize.

THE COURT: What does it show you about profit withdrawals?

MS. BROWN: So in that manual which is referenced in both our brief and in the expert reports, it talks about profit withdrawals, cash withdrawals and other types of debits and credits and that are in the system. And profit withdrawals and cash withdrawals are both recorded as debits, which is consistent with what's reflected on the customer statements because these transactions, contemporaneously, not after the fact, are treated as deductions to the customer's reported equity balance at the

time.

And that's one of the arguments we'd like to make at our full hearing -- and I'm happy to say it now -- but none of these -- all of these --

THE COURT: Why don't you tell me why there's a factual issue why this can't be decided on the evidence that's been produced by Mr. Blecker.

MS. BROWN: Okay, so there's several things. For one --

THE COURT: I mean, it's sort of been presented as a motion for summary judgment even though it isn't.

MS. BROWN: Sure. So Ms. Chaitman just referenced that Mr. Blecker was entitled to a certain amount. There is no facts on the record as to what that amount is and we should be allowed to develop those facts on a fuller record.

The other thing I want to point out is she point to the fact that there's nothing SIPA that permits the trustee to do this and that's not true. Under 78fff-IIb, net equity claims are only paid if they're ascertainable from the books and records of the debtor. We have, you know, a 30-year, 30 to 40-year fraud here and we have voluminous records.

So what our experts did, the trustee hired forensic accounting experts to assist him in reconstructing the books and records. Once they were complete doing their

analysis and their forensic accounting work, they reached their opinion which we want to present to you as part of the profit withdrawal litigation and on the basis of those opinions the trustee met his statutory obligations to determine net equity in a certain manner.

It's up to the court to determine whether that manner is consistent with SIPA and how that calculation should be applied in any one case. But that -- those issues should be developed only on a full record after the court has heard all of the evidence and argument and not on a one-off claims motion with no support.

THE COURT: But the evidence is that as to Mr. Blecker, there's no backup to support the argument that the PW (indiscernible).

MS. BROWN: We disagree with that. We disagree with that for several reasons.

THE COURT: What's the evidence other than the extrapolation other than the expert findings to the pre-1998 period?

MS. BROWN: Well, we think that evidence is sufficient and we think that we should be entitled to present the full record.

THE COURT: I understand that part.

MS. BROWN: But in addition to that, MR. Blecker received contemporaneous statements. The customer

statements are reliable for the purposes of the cash-in and cash-out transactions, including the profit withdrawal transactions. Mr. Blecker -- so as Your Honor pointed out earlier today, Mr. Blecker invested $200,000. Eleven years later, the only amount that he had to transfer was $206,000 according to this statement. That's all in the books and records of the debtor.

There's no explanation from Mr. Blecker as to where --

THE COURT: There were no fictitious profits in that account?

MS. BROWN: There were fictitious profits that were withdrawn and then some portion of that fictitious profits was transferred to the other account. So I think there are -- we also have several documents that are year-end BLMIS documents. And what those documents show is that the profit withdrawal transactions were reductions to his net equity.

We also will rely upon the House 17 manual that I referenced earlier, which is another record of the debtor. And I'd like to point out that Mr. Blecker is also relying upon the statements for purposes of his deposits. He doesn't -- you know, no one has records that go back 30 years for purposes of their deposits. And the trustee is relying on the cash transactions of those statements to

determine net equity, which is precisely what all of the customers do for purposes of establishing their deposits.

Your Honor, if I may, I'd like to make one other point with regard to Blecker.

THE COURT: Go ahead.

MS. BROWN: It's not on this particular issue, so do you have any other questions about today?

THE COURT: No.

MS. BROWN: Okay. So the last point I want to make today that even if the court was inclined to go forward on Mr. Blecker's claim today, he filed a claim of motion with regard to account 1B0022. The last transaction in that account is an inner account transfer to account number 1B0156.

As Your Honor is aware Engelmayer recently affirmed this court's opinion on the inter account transfer issue. And just last week Mr. Blecker filed a notice of appeal to the 2nd Circuit on that issue. So even if the court was to hear Mr. Blecker's claim dispute today, there can be no final order that can issue because that -- Mr. Blecker's claim is involving an appear to the 2nd Circuit.

THE COURT: I thought that there was no inter account transfer into this 22 account, right?

MS. BROWN: There is -- not. There is --

THE COURT: It's a cash deposit and I thought your

argument was even if he had money in the account it was transferred out to an inter account transfer.

MS. BROWN: It was. So the value of this --

THE COURT: -- under any set of circumstances.

MS. BROWN: That's correct.

THE COURT: Yeah, I understand that.

MS. BROWN: I suppose of the inter account transfer decision were to come down a different way from the 2nd Circuit --

THE COURT: But it wouldn't matter because there was never an inter account transfer into this account. Right?

MS. BROWN: There was not one into B22.

THE COURT: You agree that this account was funded with cash.

MS. BROWN: We do agree with that.

THE COURT: Okay, so there was never an inter account transfer and then he transferred out whatever he had.

MS. BROWN: So you're right. So the value of this account is zero under any calculation.

THE COURT: -- transferred $206,000 or $260,000 depending on --

MS. BROWN: You're right.

THE COURT: Right, all right.

MS. BROWN: Thank you, Your Honor.

THE COURT: All right. Let me hear from SIPC and then I'll hear from you, Ms. Chaitman.

MR. BELL: Your Honor, there are two orders that pertain here. One is the claims procedure order with regard to Mr. Blecker's claim that was entered on December 23, 2008. And there is the order --

THE COURT: Is that the one that requires the trustee (indiscernible) request to hearing?

MR. BELL: Well, it requires the trustee to make determinations as to claims and then set a hearing.

THE COURT: Right, as opposed to properly request a hearing.

MR. BELL: Exactly.

THE COURT: Okay.

MR. BELL: But I'll address that in a minute. And the second order is this court's order on June 25th, okay.

THE COURT: Yeah, nobody's mentioned that one.

MR. BELL: So let's address the first one first, promptly. Well, in this case we're dealing with customer claims and we're dealing with certain issues like net equity, time-based damages and inter account transfers that have all been heard before this court and appeals have been taken by numerous customers and I would imagine at some points in time Mr. Blecker was in those because I still

don't have an answer to the question I asked this court four weeks ago from Ms. Chaitman who she represents on the customer objections. So I can't address that clearly to the court.

But clearly we have situations here where you rely on what the customer submits. Last night at 5:18 I received a copy of Mr. Blecker's answers to the requests for admission and he admitted he got the statements, including the statement where we have the purported profit withdrawal.

And as this court knows from the briefings that have been filed by the trustee and SIPC in July and again in January, those statements are under New York law 10-day objection period and there is no objection contemporaneously found by that.

THE COURT: So what does that mean with respect to all the fictitious profits in the statements?

MR. BELL: It means the person has accepted it at contemporaneous on that time, not when he's 102 or 104 but back in the day which is back in the last century, so he's probably 88. You know, I'm not going to talk about his capacity but clearly we have an issue that's much more complex.

This court set a procedure where we are almost finished discover in less than three weeks. We have on the 14th of April a brief due from the other side and on the 5th

of May a brief due from us. I think the trustee and SIPC are amenable to moving that schedule up if that would help and then you would have a full record.

THE COURT: I think it's going to have to be an evidentiary hearing in this. This isn't going to be resolved on the papers. I'm going to have to hear the experts.

MR. BELL: Exactly.

THE COURT: The other side's going to be entitled to cross examine the experts. We need to think about some sort of an omnibus procedure which would be a trial rather than papers.

MR. BELL: And that's what we wrote in our response to Ms. Chaitman's motion. This is a complex issue where it goes through a whole bunch of people. Back in the day when this thing started, there were over 600 and something potential customers. We're down to 53 or 54 as the counsel have looked at this and we have narrowed the issue for this court. Who knows what we will have when we get to the hearing date?

So I do think and I have total sympathy of every victim of Bernie Madoff, particularly this 104-year-old man but the rule of law has to pertain here, Your Honor, with regard to this and we should stick to the procedures that this court has set in both of those orders. Thank you, Your

Honor.

THE COURT: Thank you.

MS. CHAITMAN: Judge, I know how thorough you are. I just ask you to do one thing before you rule. Look at the statements that Mr. Blecker received.

THE COURT: And I was reminded of something, Ms. Chaitman. The motion was brought with respect to the 22 account and everybody has to agree that there's nothing in that account.

MS. CHAITMAN: No. Can I just finish on this other part, first?

THE COURT: Go ahead. I'm sorry.

MS. CHAITMAN: Okay. I just -- if you'll forgive me. Mr. Blecker received the statements. Of course we never denied he received the statements. I want you to look at the statement. There are samples of them in the records. It says whatever the company is, Check AT&T.

THE COURT: Does it say Check AT&T?

MS. CHAITMAN: It says Check and then the name of a company, right? It doesn't say check to customer, check Aaron Blecker. It says Check AT&T. Now, when there are withdrawals to the customer it says check to the customer.

THE COURT: Is your theory that that's a fictitious entry?

MS. CHAITMAN: No -- well, who knows?

THE COURT: But that's the point. In other words, he gets the statement. He sees a debit.

MS. CHAITMAN: And he also sees that he has a purchase into his account. Yes, there's a debit --

THE COURT: But that's why I'm asking you whether you're saying that's a fictitious entry or not.

MS. CHAITMAN: There was a purchase into his account of AT&T stock. Now, whether the stock was actually purchased, I have no idea. But the point is it wasn't a debit, which showed a payment to him. It was a debit which showed that stock was purchased for his account.

THE COURT: Well, we don't know what it is. We don't know what it is.

MS. CHAITMAN: But the point is in every one of those statement, if you look through either that statement or the next one, you see there's an addition of stock in the name of the purported payee of the check.

THE COURT: But I looked at one of them and the check, the PW was I think 12 days after the stock was purchased. That seems like a long time. Why would the check be issued to the company at that time?

MS. CHAITMAN: Judge, if the trustee hasn't gotten one fact witness who actually was involved with this -- the point is, Your Honor, there is nothing in the factual record which suggests that this check was paid to Aaron Blecker.

And, indeed, when I first got involved in representing Mr. Blecker I said to the trustee give me the fronts and backs of these checks. How could Mr. Blecker have cashed a check made out to AT&T? And that was the time at which the time disclosed that he didn't have the bank records.

If it was a check to Mr. Blecker it would have said check to customer.

THE COURT: Okay, now come back to my question. He was seeking an allowance of the customer claim with respect to the 22 account. That's what the motion is seeking.

MS. CHAITMAN: Right.

THE COURT: And whatever else happened, all of that money was transferred to another account, so that account has to be zero under any set of circumstances, doesn't it?

MS. CHAITMAN: Well, no, because if in fact -- well, I don't -- all right, so I guess what you're saying is that I should have moved with respect to the other account.

THE COURT: Well, what I'm saying is you moved with respect to the 22 account and even if you're right on everything else, all of that money was transferred, so the trustee is well within his rights to deny any -- or SIPC's within its rights not to insure that account.

MS. CHAITMAN: You know what, Judge? The man is

104 years old.

THE COURT: I understand that.

MS. CHAITMAN: The case is -- but it's not a question of being sympathetic. The statute requires that claims be paid promptly and, you know, what --

THE COURT: Let me ask you a question. It's a question I've had in my mind. And this may be the difference between fraudulent transfer actions and these claims determinations. The statute says that the claim has to be satisfied to the books and records of the trustee.

If the trustee makes a reasonable determination based on this expert's reports that PW is an actual debit to the account -- can I look behind that? The question then is the determination reasonable as opposed to, you know, what the evidence supports at the trial?

MS. CHAITMAN: We don't dispute that it's a debit to the account but it's a debit to the account because there was money purportedly paid to the company that issued the stock. It was a purchase of securities for the account.

THE COURT: Well, but if it's a debit to the account why doesn't it reduce the balance of the account?

MS. CHAITMAN: Because these were fictitious.

THE COURT: That's what I'm asking you, whether it was an actual payment or not.

MS. CHAITMAN: The trustee is claiming that the

money went to the customer. It did not go to the customer, so we have to conclude then that it was fictitious. Judge, we're speculating on --

THE COURT: What about the fact that he only pulls $206,000 out of this account after 15 years, you know, and he testified that he never pulled money out because he thought it was such a great investment?

MS. CHAITMAN: I have no way of certifying the records. As the trustee's own expert has said, these records are riddled with fraud. We now have the trustee saying that the amount that Mr. Blecker should be paid to the successor account for the profit withdrawals and, in fact there were profit withdrawals from that account but the expert says the number is $558,868.

So the thing is, Judge, it's not --

THE COURT: So you should move with respect to or seek payment with payment to the accounts that their own expert says have a certain balance, unless you disagree with facts.

MS. CHAITMAN: I have no basis to disagree with it but the point is, Judge, I can -- yes, I can make that motion.

THE COURT: Or just ask them. Say your expert says he's owed this much money, so pay him.

MS. CHAITMAN: No, because what the expert says is

if the court accepts that when there's no evidence in Madoff's records, when there's no letter from the customer, there's nothing, which suggests -- and that's the case with Mr. Blecker. The trustee has zero evidence in Mr. Blecker's records that he ever received that money.

Judge, I could make that motion or you could orally amend my motion to accept it. You know, the man is 104 years old. We're nine years since this money should have been paid.

THE COURT: Can I ask you a question? You mentioned -- and I understand he's 104 years old. When this issue first arose, the trustee initially made a motion and you objected. The trustee withdraws that motion. Then the trustee doesn't and makes another motion, you don't object and you write a letter subsequently after the order is entered saying, yeah, we want to continue to litigate this PW issue. Why didn't you object? You know, he was 103 then. Why didn't you object and say, look, this is too long at this time?

MS. CHAITMAN: Perhaps I should have. I didn't think that the court would entertain an objection to the whole procedure that the trustee was proposing.

THE COURT: Well, so why didn't you make the objection in the first place, cause them to withdraw the motion?

MS. CHAITMAN: Well, this doesn't just involve Mr. Blecker, Your Honor. There are scores of --

THE COURT: No, but your original objecting memo -- and I read that yesterday also -- was mostly about Mr. Blecker and he is 104 years.

MS. CHAITMAN: Yes, because he was my client.

THE COURT: You have a lot of clients.

MS. CHAITMAN: I did. But this is the only one with whom I was dealing with this issue at that time. I was not aware of how --

THE COURT: I don't understand why you just didn't object and say, you know, this is my client. It's his main issue and we just can't wait.

MS. CHAITMAN: But Judge, I'm here before you now. The trustee has had every opportunity to take discovery.

THE COURT: But there's a scheduling. My point is there's a schedule which was approved following the hearing which you had notice and you didn't object. And the schedule is still running.

MS. CHAITMAN: There's nothing that an expert could say that would change the facts, Judge.

THE COURT: I don't know. All right. Look, I'm going to deny your motion. First of all, two preliminary points. You made the motion with respect to account 22 and as I stated on the record, even if you're right about

everything else, all of the money was transferred out of account 22 into another account, so that's a zero account and under any set of circumstances, Mr. Blecker's not entitled to anything with respect to that account.

Secondly, as I have indicated, you agreed to a procedure, or at least you didn't object to a procedure although you objected to a similar procedure beforehand. And we're following that particular procedure.

This is one of those omnibus issues. It doesn't just affect you. If it only affected you we wouldn't have had the procedure. We just would have had the trial. And the procedure has to run its course.

With respect to the procedure, this is not the kind of thing that's going to be decided on paper, so you ought to stop and think about an omnibus type of hearing where we can hear the experts testify, see them cross examined and hear counter experts.

As I mentioned, I have this issue about if the trustee makes a determination based on the existing books and records with the aid of the expert and that determination is reasonable, doesn't matter if it's not right. And again, SIPA may be different from a (indiscernible) transfer action in that respect.

But getting to the merits, I'm looking at this really as a motion to summary judgment as opposed to a, what

essentially you're asking for, judgment on your claim. I think there are issues of fact. There are issues of fact relating to the expert reports. I haven't seen the counter expert reports.

I have a question about the credibility of Mr. Blecker's statement that he thought this was a great investment, yet after 15 years he pulls out $206,000 which suggests, you know, the kind of interest rate you'd get today on a checking account.

He's getting these statements every month that are showing debits or whenever these profit withdrawals occur and he doesn't say anything. I don't know what those are. With respect to Mr. Madoff's declaration, I look forward to hearing his testimony on the phone. His declaration doesn't say what these profit withdrawals are and I would think that some of you would just want to take the deposition of somebody who knew what they were. That may be easier said than done but it seems to me that's the best evidence of what they are.

And for those reasons, I will deny your motion. You can submit an order. Yes.

MS. CHAITMAN: Your Honor, two points.

THE COURT: Is this a motion for an argument?

MS. CHAITMAN: No, no, it isn't.

THE COURT: Okay.

MS. CHAITMAN: It isn't. Just two points. We would like to seek an order from the court -- and I will be filing a motion -- to depose Mr. Madoff.

THE COURT: Why don't you just get it in his affidavit?

MS. CHAITMAN: I'm sorry?

THE COURT: You got an affidavit from him.

MS. CHAITMAN: Right. But you said you're going to require testimony.

THE COURT: Well, I am going to require testimony. It's obviously an issue regarding the extrapolation of the findings of the expert to earlier periods. There's an issue with the expert report, I suppose. But it sounds to me like the 10-year period between 1998 to 2008 the expert has concluded that there's almost a one-to-one correlation between the profit withdrawals and actual withdrawals.

And your issue is really whether that should be fact (indiscernible) because we don't have that correlation. And in particular, you have a client -- there's no records for your client, client has no recollection of withdrawing any money. But I said, you know, the trustee is asking me basically to determine on the expert reports on an omnibus basis that this is what PW means all periods and that just sounds like a factual issue.

MS. CHAITMAN: It is a factual issue. We're going

to move to strike the expert reports, Your Honor. We'd like to set a schedule to do that because I don't believe the law permits -- we've cited both 2nd Circuit law and New York State law and from other circuits and even a Supreme Court case -- that you can't have expert testimony to establish a specific fact like this.

So we want to move to strike those expert reports, number one. And number two, Mr. (indiscernible) is dead. The only person who has personal knowledge of these entries is Mr. Madoff and we would like to take his deposition so that the --

THE COURT: Well, I'm not going to say you can or you can't but was he actually keeping these records or --

MS. CHAITMAN: He was directing who -- I mean, I have to assume that he was directing the records and he certainly was knowledgeable enough to submit that declaration. So we'd like to submit papers to take his deposition and we'd like to set up a schedule because we will be moving to strike the expert reports. We have not --

THE COURT: But this is a SIPA case. Can't the trustee in a SIPA case hire an expert to help them understand the books and records. You know, he's a trustee. He inherits all this stuff. And he doesn't know what it means. How does he find out what it means?

MS. CHAITMAN: I'd like to brief the issue, Your

Honor, because I don't think that this is --

THE COURT: I mean, I'm not going to tell you you can't make that motion.

MS. CHAITMAN: You want me to just file a motion or do you want to set a schedule or how would you like to do that?

THE COURT: Well, why don't you -- and you don't want to wait until the procedure is done?

MS. CHAITMAN: Well, the trustee's expert reports are produced. We are not putting in any expert reports because I don't believe they're admissible or relevant and I'd like to move to strike the trustee's expert reports.

THE COURT: As I said, I'm not going to tell you you can't move to strike the expert reports. But it would be in connection with the entire omnibus procedure.

MS. CHAITMAN: Yes, yes.

THE COURT: All right.

MS. CHAITMAN: Shall I just do that?

THE COURT: (indiscernible). Yes.

MS. BROWN: It may make sense while you're even discussing today is an omnibus proceeding to have a trial to incorporate these types of motions into an actual procedure.

THE COURT: Well, but it will shortcut -- what you're saying is it will shortcut the trial if I strike the expert report. Then it's going to be -- you know, it's

going to be a creditor on creditor basis of claims.

MS. BROWN: Right. But I think we should be able to complete the briefing on all the issues.

THE COURT: What's the briefing going to tell me? At the end of the day it's a question of whether I credit the expert, isn't it?

MS. BROWN: Well, we think that's what should be developed at trial?

THE COURT: What issue are you briefing?

MS. BROWN: What issue are we briefing?

THE COURT: Yes.

MS. BROWN: We are going to brief any additional issues that were raised in discovery and I think we need to address this additional legal issue that you've raised today which is whether or not the court can look behind the trustee's determination, if that determination is reasonable.

THE COURT: Well, rather than look behind, is that the sole test?

MS. BROWN: Okay.

THE COURT: You can make your motion.

MS. CHAITMAN: Okay. Thank you.

THE COURT: I think it'll shortcut the proceeding. The motion is granted. I have my question that I would grant such a motion.

MS. CHAITMAN: I know. I have an uphill battle, but.

THE COURT: But go ahead and make your motion.

MS. CHAITMAN: Okay, great.

THE COURT: All right. Thank you.

MR. BELL: Thank you, Your Honor.

THE COURT: You can submit an order denying it for the reasons stating it on the record without setting forth the reasons since we'll have a transcript. And you can identify the clients you represent, Ms. Chaitman?

MS. CHAITMAN: I can. Oh, you mean all the clients.

THE COURT: Yeah.

MS. CHAITMAN: Okay. There are a great number of them --

THE COURT: I understand that.

MS. CHAITMAN: Did you want me to write --

THE COURT: Didn't you discuss that a conference, you were supposed to do that?

MS. CHAITMAN: No, I did. There's a chart. It's annexed to all my papers.

THE COURT: Yeah, but things have changed.

MS. CHAITMAN: No, but this list has been -- do you want me to file it with the court?

THE COURT: Why don't you just tell them? They

want to know who you represent.

MS. CHAITMAN: But they have it.

THE COURT: So give it to them again.

MS. CHAITMAN: Okay.

THE COURT: All right? It would take less time than it took setting up this conversation.

MS. CHAITMAN: Okay. Thank you.

THE COURT: All right. Thank you. The next motion is the motion to affirm the trustee's determination denying customer status to a group of investors and I guess four or five different partnerships. I received the certificate of no objection. Is there anyone here today who wants to object to relief sought by the trustee? All right. The motion will be granted. I've reviewed the papers. It looks like many similar cases involved investors in an entity then turned invested in BLMIS.

In those cases, the customers admit through (indiscernible) sponsored a request for admissions that they weren't customers and I'll affirm the trustee's determination. You can submit an order. Thank you.

MAN: Thank you, Your Honor.

THE COURT: Auerbach.

MR. HUNT: Your Honor, Dean Hunt for the trustee. This case has completed discovery. Expert reports have been completed. We've mediated the case. That was unsuccessful

and the case is ready for trial.

THE COURT: Okay. So I need a pretrial order.

MR. HUNT: Okay, Your Honor. Your Honor, with respect to that, we believe that we will submit the majority, if the court permits, the majority of our direct testimony by declaration. We have discussed that with defense counsel.

THE COURT: Well, I'd like to know what are the disputed issues of fact, for instance in (indiscernible), everything was stipulated to and the trial lasted ten minutes. And that was an effective way of doing it.

MR. HUNT: Yeah, we think we're pretty close to that here on our side.

THE COURT: That's really what I'm looking for. So I'm not sure I want a pretrial order. If you want to submit -- you may not even need testimony is what I'm saying depending on what the stipulation of fact says. But I don't have a problem with you submitting your direct testimony, either side, I suppose. And you can get an affidavit or a declaration.

MR. HUNT: I think that's something that will be happening and I think all our exhibits -- excuse me, our exhibits will probably be admitted, be pre-admitted by agreement.

THE COURT: Is there a dispute regarding the

deposits and withdrawals?

MR. HUNT: We don't believe there is.

THE COURT: Who represents the defense? Is there a dispute? I mean, you've looked at what the trustee --

MR. FOLKENFLIK: There are no disputes on deposits and withdrawals.

THE COURT: So are there any disputed issues of fact.

MR. FOLKENFLIK: Let me try and --

THE COURT: Would you just identify yourself?

MR. FOLKENFLIK: Yes, Your Honor. Good morning. I'm Max Folkenflik, Folkenflik & McGerity, counsel for the Auerbach trust and Robert Auerbach, currently deceased, the state of Robert Auerbach and Joyce Auerbach. We had a meet and confer session. There were a number of issues. Obviously my client has a relatively small amount at issue, $570,000.

So we have tried -- I think I discussed this case with Your Honor a couple years ago. We've tried to --

THE COURT: Not with me a couple years ago, but okay.

MR. FOLKENFLIK: I believe there was a conference --

THE COURT: Well, maybe yes.

MR. FOLKENFLIK: Where Your Honor said we've got

to get these cases moving toward trial and here we are two years later.

THE COURT: I suppose that's progress, Mr. Folkenflik.

MR. FOLKENFLIK: I'm not sure, but somewhat. But there are a couple issues that I did want to raise, first as to disputed issues of fact. I think there is no disputed issue of fact that but for the interpretation of the interaction between SIPA and the bankruptcy code that Your Honor has adopted and Judge (indiscernible) had adopted, my client would have a claim against BLMIS and the Bernard Madoff estate that exceeds the amount of the claw back that's being sought.

And the reason I -- and I asked counsel for the trustee to stipulate to that because as a matter of law my clients opened their account with $2 million in --

THE COURT: Why didn't you just file the claim against the general estate?

MR. FOLKENFLIK: Pardon me?

THE COURT: Have you filed a claim against the general estate?

MR. FOLKENFLIK: We filed -- I don't recall whether we filed a claim against the general estate at this point. We may have. But the point is that if there is such a claim against the general estate exceeding the amount of

the claw back and the 2nd Circuit disagrees with Your Honor's interpretation on the antecedent debt issue and Judge (indiscernible)'s interpretation, then my client would have the --

THE COURT: In other words, just a 2nd Circuit summary order which indicated -- which seemed to adopt the view that you don't -- there's no value given for fictitious profits.

MR. FOLKENFLIK: That's not -- well, that's not precisely the way I'd frame the issue. I would --

THE COURT: Well, there are two issues. There's the SIPA issue with the estate within the estate. But then there's the more general issue that if you get fictitious profits you can't get consideration for fictitious profits, the value.

MR. FOLKENFLIK: Well, Your Honor, it's not a question of fictitious profits.

THE COURT: But that sounds like a legal issue.

MR. FOLKENFLIK: It's a legal issue.

THE COURT: Right.

MR. FOLKENFLIK: But I want to preserve the legal issue by addressing the factual issue of my client's claim against the Madoff estate and I'm --

THE COURT: But weren't you part of the withdrawn proceedings?

MR. FOLKENFLIK: I was.

THE COURT: So you preserve the issue.

MR. FOLKENFLIK: Well, not at -- so we have to address it at trial.

THE COURT: I'm not going to reconsider the thought for the --

MR. FOLKENFLIK: I'm not asking Your Honor for that.

THE COURT: So what is the factual issue?

MR. FOLKENFLIK: The factual issue I'm asking we would have to demonstrate with facts or risk having collateral to stop --

THE COURT: Well, if you have that last monthly statement, it's going to show a balance, I assume, right?

MR. FOLKENFLIK: Yes, it is.

THE COURT: And your argument is that under Article 8 UCC you have a claim for that amount, right?

MR. FOLKENFLIK: That's one of the claims. An alternate claim is a claim for fraud in 1999 and with interest starting at 9% per year as a matter of statutory right. So we have --

THE COURT: It's only on a judgment though.

MR. FOLKENFLIK: Pardon me?

THE COURT: It's only on a judgment, right?

MR. FOLKENFLIK: It's pre-judgment interest,

that's right, from the date of the trial.

THE COURT: Are you looking for a judgment?

MR. FOLKENFLIK: Pardon me?

THE COURT: Are you looking for a judgment?

MR. FOLKENFLIK: I'm looking to be able to avoid the claw back by asserting -- and the 2nd Circuit agrees -- by asserting that the amount that's being sought is less than the amount of my client's claim against Madoff.

THE COURT: You mean you're going to try to --

MR. FOLKENFLIK: Pardon me?

THE COURT: You want to try a fraud claim against Madoff within the context of the suit?

MR. FOLKENFLIK: Not at all. I just want to stipulate to the facts that I think the fraud claim's established by the trustee's arguments and by the trustee's proof and by the trustee's complaint. I think that the issue is how much, what's my client's claim using the world claim as it's used in the Bankruptcy Act.

And I think an antecedent debt is based on the merit of the claim. Your Honor's decision, Judge Rakoff's decision to cut to the chase, says there's a conflict between these two federal statutes. In order to read them together in a way that's most sensible, you have to say that the antecedent debt in the Ponzi scheme case cannot be the amount of the claim for fraud or otherwise. It's not a

matter of just the statement value, which it could be. As counsel for the trustee pointed out, they send a statement, ten days later it's bonding on both parties as a matter of law.

And when I watched argument on the net equity case in the 2nd Circuit, then Chief Judge Jacobs clearly said I think all of the customers had claims against (indiscernible) for the full amount of the statement value and Judge (indiscernible) nodded her head, yes.

So I think --

THE COURT: You may be right but I'm not so sure that the statement courts have interpreted it that way in insurance cases?

MR. FOLKENFLIK: Pardon me? But right now we're talking as a matter of federal law.

THE COURT: So what is --

MR. FOLKENFLIK: I just want to establish the amount of the claim and not the legal consequence of the existence of the amount of the claim but that the amount of the claim exceeds the $570,000 --

THE COURT: So essentially you want to try to settle it.

MR. FOLKENFLIK: Pardon me?

THE COURT: You want to try to settle the claim.

MR. FOLKENFLIK: That's one way of looking at it.

I wouldn't quite describe it that way.

THE COURT: But isn't the response that that is irrelevant to the purposes of this trial?

MR. FOLKENFLIK: If the 2nd Circuit disagrees with Your Honor, no. And if the 2nd Circuit agrees with Your Honor, yes. I just want to be able to tee up the issue for the 2nd Circuit.

THE COURT: I understand. Let me just hear a response to that.

MR. FOLKENFLIK: Okay, because I have a few more issues to raise.

MR. HUNT: I agree with what you said, Your Honor. That's not really relevant to this case.

THE COURT: But it does create a record. In other words, at the end of the day he'll make an offer of proof and we'll either litigate it or not litigate it because --

MR. HUNT: Yeah, whatever facts he wants to raise at trail, if they're admissible in trial --

THE COURT: It sounds like we're going to be litigating a fraud case, also.

MR. FOLKENFLIK: Well, Your Honor, I think we could stipulate to it because I don't think it's disputable. But I don't know. That sounds like it is. The amounts are disputable. The legal consequences aren't. There should be no trial under those circumstances because there isn't a

factual dispute.

THE COURT: It sounds like there's a factual dispute though as to the amount of your damages, even if you're right on the fraud and I agree, you know, they say your client was defrauded by BLMIS and Madoff but there's a dispute other than I guess it's UCC Article 8 issues as to the amount.

MR. FOLKENFLIK: There's also no dispute also the entitlement to prejudgment interest at 9% from 1999.

THE COURT: I know.

MR. FOLKENFLIK: Pardon me?

THE COURT: I know because I'm not going to enter a judgment on your claim?

MR. FOLKENFLIK: Pardon me?

THE COURT: I'm not going to enter a judgment on your claim.

MR. FOLKENFLIK: It's not post judgment interest, Your Honor. It's prejudgment interest. So if I litigated in the --

THE COURT: But in order to get prejudgment interest you have to get a judgment, don't you? Isn't there a recent (indiscernible) case on that by Judge --

MR. HUNT: That's going to depend on whether --

THE COURT: Yeah, I'm not so sure you're entitled to prejudgment interest. Go ahead.

MR. HUNT: Okay. The bottom line is I'd like to tee up the issue and have a factual record and I don't think there should be as much resistance as there is. But we are where we are. There's a second question that during our meet and confer session a week ago I asked why are we trying this case at all in this court.

THE COURT: Because he says you owe them money, at the risk of being --

MR. FOLKENFLIK: But as I said, but in this court, because respectfully as I understand the (indiscernible) rulings by Your Honor, you're going to report and recommend to the district court and I am not aware of an Article 1 judge having a trial without consent and then reporting and recommending on the factual findings at the trial. I think if there is to be a trial it should be held in district court.

THE COURT: Really? You're not familiar with procedure in this court, then.

MR. FOLKENFLIK: I may be deficient.

THE COURT: And maybe you impliedly consented to my trying the case during the final judgment. That's another issue I guess.

MR. FOLKENFLIK: I don't believe I impliedly consent. We went through the --

THE COURT: If you think somebody else should try

this case, don't make that argument to me. Make a motion to redraw the reference. What else?

MR. FOLKENFLIK: Okay. And then there is an issue of subsequent transferees. The case has been started and proceeded right to this -- asserting my clients are subsequent transferees, which they are. There was a trusting between them and Mr. Madoff.

During our meet and confer session, Mr. Hunt said he was going to make a trial motion to amend to assert that my clients are initial transferees. And when I raised that this morning he said he's not doing it at this time. I'd like to clarify that issue.

THE COURT: That's the benefit of the pretrial order. We know exactly what everybody is claiming. I'm not sure that if you concede that you're a subsequent transferee what the difference is unless you think you can assert a defense as a subsequent transferee but you can't assert an initial transferee and I don't know if this is a (indiscernible) since the initial transferee and subsequent transferee are obviously related.

MR. FOLKENFLIK: Yes. The initial transferee was a revocable trust. I understand the issues that are raised by that. But there's a matter of burden of proof and burden of persuasion and order of proof in terms of the defenses which are the same but the defenses -- there's more burden

on the trustee.

THE COURT: All right. Well, you can deal with that in pretrial order because at that point you'll have to know if the trustee intends to assert.

MR. FOLKENFLIK: Okay. And the other thing is, Your Honor, I had just advised my client I would try and persuade Your Honor to defer our case to later in the queue so that this issue on which her case turns might be tried before the 2nd Circuit without her having to go to the expense of proceeding with a trial.

THE COURT: Couldn't everybody make the same argument?

MR. FOLKENFLIK: I think everybody could. I think it's more compelling argument when you've got a small amount. We have Mr. Levy here who is making the exact opposite argument. He's saying please let me into this case because we want to have the case tried.

THE COURT: Yeah. He's made that argument before.

MR. FOLKENFLIK: He has made that argument before. So, Your Honor, the issue is, yes, everybody could say let me go last and when there are 500 cases and they're being tried currently at the rate of one per year, going last seems to be quite a victor. But that's not the issue here.

The issue is why is the trustee selecting the small dollar cases and picking them off first? And I think

what happens --

THE COURT: Why do you think he's doing it?

MR. FOLKENFLIK: I think he's doing it to put an appropriate pressure on the defendants in the small dollar cases to settle rather than to extend the amount of legal fees involved. And by doing so he's causing them to forfeit the right to have a dispositive issue heard by the 2nd Circuit.

THE COURT: You know, you're telling me aside from the amount that your clients damages, that there are no disputed issues of fact. All you have to do is enter into a comprehensive pretrial order and then it's a legal argument.

MR. FOLKENFLIK: And that's right.

THE COURT: Most of the legal issues have been resolved. So then you ask me to certify the question to the 2nd Circuit and you go up to the 2nd Circuit.

MR. FOLKENFLIK: If Your Honor would consider that procedure, we would --

THE COURT: It's provided for in the statute.

MR. FOLKENFLIK: I'm just trying to get to the point where my client doesn't give up rights and doesn't end up spending so much money in legal fees in the process of preserving rights that the game isn't worth the (indiscernible).

THE COURT: I got it. All right.

MR. HUNT: Just to recap, I think we're ready for trial.

THE COURT: Well, I need the pretrial order as has been made abundantly clear by this lengthy extended draft of the pretrial order by Mr. Folkenflik.

MR. HUNT: Two, three weeks, something like that? We would like to try to set a date for trial, too.

THE COURT: Let's work -- let's do it this way. When are you going to send a pretrial order?

MR. HUNT: Three weeks from today.

THE COURT: So what day is that? Why don't we make it April, okay? I'm sorry, February, I missed a month. It's about the middle of March. It's more than three weeks. Let's say Friday, March 18th. Okay? You'll send them. How much time, Mr. Folkenflik, do you need to turn it around?

MR. FOLKENFLIK: I think three weeks as well, Your Honor.

THE COURT: All right. So what does that take us to? That's the 39th of March, which is April 8th? April 8th. Schedule another conference and I'll fix the trial date at the next conference. April 14th. Plaintiff can use numbers for the exhibits. Defendant can use letters. Yes, Mr. Levy.

MR. LEVY: Good morning, Your Honor. Richard Levy at Pryor Cashman for various customers. This does raise the

question. Yes, we did ask you previously to be admitted in the (indiscernible - Cullen) case to intervene.

THE COURT: It's sub judice.

MR. LEVY: Pardon me?

THE COURT: It's sub judice.

MR. LEVY: It's sub judice? We have the exact same issues in almost the exact posture of this case although we are here earlier than we were in (indiscernible - Cullen).

THE COURT: Well, the issues, I don't know what the issues are until I see the pretrial order. As I said with respect to (indiscernible - Cullen), I'm not going to hear you on issues that the party doesn't intend to raise.

MR. LEVY: Understood, Your Honor.

THE COURT: I may not hear you readily but I'm certainly not going to hear you on issues that the parties aren't raising. So I don't know what the issues are.

MR. LEVY: Then may I suggest, Your Honor, we'll remain vigilant as to what's happening in the procedure. We may well be back here to ask you for permission to appear.

THE COURT: I'm sure you will be.

MR. LEVY: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. FOLKENFLIK: Thank you, Your Honor.

THE COURT: Thanks. See you April 14th. The

discovery conference in Bernfeld. Yes.

WOMAN: Good morning, Your Honor. Counsel did appear. The clerk had asked me if counsel is here and at the time he wasn't but he is here now.

THE COURT: Did you give your appearance to the reporter?

MR. WEDEEN: Not yet, Judge.

THE COURT: Why don't you do that?

MR. WEDEEN: Good morning, Timothy Wedeen, W-E-D-E-E-N. Judge, I'm here on three cases, all the same issue.

THE COURT: Okay.

MR. WEDEEN: Just for the record it's (indiscernible) number 4841, 4918 and 8514.

THE COURT: Go ahead.

MS. HOCHMOTH: Good morning, Your Honor. My name is Farrell Hochmoth here on behalf of the trustee. As counsel said, I'm here on three cases (indiscernible), Alan Bernfeld and Marilyn Bernfeld. I am here today to ask the court's permission to file a motion for sanctions pursuant to Federal Rule of Civil Procedure 37b2A and C.

The trustee served discovery in each of these three cases last July. When defendants did not respond to that discovery, the court held a conference at the end of October where he ordered the defendants to respond to the discovery. Orders were submitted to the court and signed

requiring the defendants to respond to the discovery by December 1st. December 2nd, we did not receive the discovery. I followed up with counsel and then eventually filed another letter on December 11th.

THE COURT: Go ahead.

MS. HOCHMOTH: Thank you, Your Honor. On December 11th requesting a conference so that the trustee could seek permission to file a motion for sanctions. That letter was originally set for a conference t the end of January. Before the hearing, counsel contacted me telling me that he had health issues necessitating an adjournment of the conference, which we did agree to, to today.

I never gave counsel any indication that I would permit any additional time to respond to discovery. In fact, Your Honor has required him to respond to all the discovery by December 1st. We have received no responses in this case to date.

I would like to point out the discovery responses are now six months overdue. There is no excuse for why counsel has not provided responses. Counsel admits that the illness that he was diagnosed with didn't occur until January which provides no excuse for not responding from August through now. Also, counsel said he's working on a reduce schedule, but in my mind, that would still permit counsel and defendants to respond to your orders from

December 1st.

THE COURT: Okay.

MR. WEDEEN: Your Honor, I agree that we are in fault. I would like to correct Ms. Hochmoth, actually, that I had some health issues which I have recovered from that were not insignificant.

My clients have provided me responses. I was wondering if Your Honor could enter almost a conditional order. Just we could have another three weeks more, thinking somewhere around there, Judge, I will be able to file responses in (indiscernible) and it should be self-enforcing. I may not --

THE COURT: And self-enforcing means what? To consent to the entry of judgment if you don't provide full responses?

MR. WEDEEN: Yes. The delay, Judge --

THE COURT: Sounds like it could be a shortcut.

MR. WEDEEN: Well, Judge, at this juncture, Your Honor, the delay really is on me. I mean, I don't belabor my medical conditions to the court but --

MS. HOCHMOTH: Okay. Your Honor, we would request that if you did consider that that you -- we would also then seek permission to file a motion to seek our attorneys fees in having to come down here.

THE COURT: You know what? Why don't you make

your motion? This has gone on long enough. You may be entitled to attorneys fees. You may be entitled to other sanctions, including the striking of the entry of judgment. But there is a conclusion. Why don't you make the motion? This has gone on a long time and I think this is the third conference I've had on this case about this matter.

MS. HOCHMOTH: Thank you.

MR. WEDEEN: Second, Judge.

THE COURT: Second. You go ahead and make your motion.

MR. WEDEEN: And we'll return on the 18th for the motions, Your Honor?

THE COURT: Why don't you see if you can work it out on a reasonably short schedule, otherwise just make the motion and get a return date for --

MS. HOCHMOTH: Yes, Your Honor. Thank you very much.

THE COURT: Okay. Take a five minute break before we do Mendelow. That's the last one I have.

(break)

THE COURT: Mendelow.

MR. NEW: Good morning, Your Honor. Jonathan New for the trustee. The trustee is seeking leave to amend the complaint in this adversary proceeding for the first time and in the very early stages of discovery. As the proposed

amendment will not be futile, will not prejudice the defendants and there has been no undue delay, the court should grant leave to amend under the liberal pleading standards of Rule 15.

The Safe Harbor does not protect individuals like Mr. Mendelow who did not have a legitimate expectation that BLMIS was actually trading securities in his accounts on his behalf.

As the proposed amended complaint alleges, Mr. Mendelow opened his accounts only after first receiving a promise from Mr. Madoff that he would receive special financial benefits which took the form of a guaranteed return of at least 17% on certain accounts, not a consistent returned but a guaranteed return, and that he would also get extra value added to the accounts every year in a predetermined amount. And that was effectuated through the entry of fictitious transactions on his account statements.

THE COURT: Well, what's wrong with an agreement where he's going to be compensated for referring customers and Madoff says, look, you know, I guarantee 17%? If your accounts don't earn that, I'll make up the difference?

MR. NEW: Well, Your Honor, first of all, I don't think it was -- I think there are two separate issues there. There's the issue of whether a guaranteed return in and of itself presents somebody with actual knowledge that the

account is not trading --

THE COURT: It seems to be relying heavily on that is to support an inference of actual knowledge.

MR. NEW: I think that's one of our arguments, Your Honor. I think we have several. With regard to the guaranteed return, again, it's not that Mr. Madoff would make it up to him. There's no evidence that when he didn't get 17% return Mr. Madoff added extra securities to his account or extra cash to his account. It was a guaranteed return that Mr. Mendelow referred to --

THE COURT: Well, doesn't that happen every December, though?

MR. NEW: The guaranteed return, Your Honor, was sort of an annual return that as Mr. (indiscernible) testified and as we allege in our complaint, come December BLMIS would be able to determine whether or not through the fictitious trades they entered up to, then, they actually achieved the 17% return and if they hadn't in December they would then raise the 17%.

On top of that, there was the extra P&L which was in a fixed amount which was then entered in December through these fictitious (indiscernible) transactions into the accounts as directed by Mr. Mendelow in the amounts directed by Mr. Mendelow.

THE COURT: That was for the customers that he

referred.

MR. NEW: Well, Your Honor, I don't --

THE COURT: Is that supposedly how it was computed or what it was based on?

MR. NEW: Well, the basis for the calculation, Your Honor, is based on Telfran customers that were returned to BLMIS directly after Telfran was shut down. But we would take issue with characterizing it as a referral fee, Your Honor, because Mr. Mendelow as alleged in the complaint did introduce other customers to Mr. Madoff over the years. There was no referral fee connection with those customers.

As the accounts decreased over time and customers withdrew their cash, there was no adjustment to the referral fee. This was not a referral fee, Your Honor. This was, as we allege in the complain, this was an effort to make up for the profits that Mr. Mendelow previously received through the Telfran arrangement with and he was now being guaranteed a set amount of money every year in perpetuity in his accounts and that was not being accomplished through cash contributions into his accounts, through a check sent to him, through securities deposited to his accounts. It was being accomplished through fictitious transactions.

THE COURT: Okay. So what are the allegations in the complaint, the proposed complaint that say that he knew that he was being raised to 17% or plus his fee

(indiscernible) fictitious transactions? As opposed to that's what BLMIS did.

MR. NEW: Yes, Your Honor. I think it's in a number of locations and I think, obviously, Your Honor, we allege that he knew that in several locations. But there are facts --

THE COURT: But that's conclusory.

MR. NEW: Yes, Your Honor. And that's why I'm going to, Your Honor, if I may, explain certain facts that show how he knew and why he knew.

First, as we allege, he contacted Mr. (indiscernible - D) every December and he said to Mr. (indiscernible - D) something to the effect of on that thing that you do, I want, you know, for example -- the example we give in the complaint is, you know, $115 million in my accounts and $115 million in my wife's account. So he knows Mr. (indiscernible - D) is engaging in a process in December that yields a predetermined amount and he tells him what he wants and where he wants it.

In addition to that, it's clear from his own handwritten calculations, the calculations that he provided to help Mr. (indiscernible - D) work out the mechanics of the extra P&L that these extra bonuses to the value of his account were not cash contributions because he didn't denote them as contributions. They weren't securities

contributions. They were something else. They were what he called the vig or a fee.

And the only way that they can be accomplished in his account, the only way to raise the balances of his account, if it wasn't cash, if it wasn't through securities, is through the purported return on securities already in the account.

THE COURT: But how did he know that the return wasn't based on an actual securities transaction? In other words, where do you allege that in the complaint of facts?

MR. NEW: Your Honor, in terms of like the securities transactions were fictitious as opposed to real?

THE COURT: Well, he knew the additional amount, whatever you call it, was being generated by fictitious trades. BLMIS we assume knew it but where are the facts that say that he knew it?

MR. NEW: Well, Your Honor, the facts that he knew it are, again, that he directed the specific amount and the accounts into which it could be made. That is not something that is possible through a real securities transaction. You can't say I want securities transactions in my account that yield $115 million and then get that $115 million on every year after year.

THE COURT: He never said -- as I understand it, you're not alleging that he told (indiscernible - D) or

someone engage in these fictitious transactions and this is how I want you to allocate it. He's simply saying I'm entitled to, you know, $200,000. I want $100,000 in my account and I want $100,000 in my wife's account.

MR. NEW: What we specifically allege, Your Honor, is that he said to Mr. (indiscernible - D) something to the effect of on that thing you do I want X amount for me and X amount for my wife. So he told him the amount. He told him how to allocate it and he referred to that thing that you do.

The other thing that I would point out, Your Honor, is that when he was directing Mr. (indiscernible - D) which accounts to put it into for most of the period of time covered by the complaint, it was his IRA. And as we've alleged in the complaint, it is not possible to make a securities contribution to an IRA account. The cash contributions would have exceeded the limits.

In order for him to have achieved that, it must have been done through transactions that delivered the exact amount on demand during the time period that he asked for it. He also received all of the account statements. We have allegations that there were handwritten notations showing that he reviewed the account statements and on the account statements for December for those IRA accounts, there were only, for many of those years, only transactions

showing these option transactions. Those are the only security transactions had occurred in the accounts in December that could yield the exact amount that he asked for.

I would also point out, Your Honor, that we have one example in the complaint where the transaction that he asked for was backdated. There is a specific example where he calls Mr. (indiscernible - D). We only know the phone records, Your Honor. We don't know what he said but we do know that generally he said to the effect of on that thing you do give me X amount. He calls Mr. (indiscernible - D) directly. He follows it up with a letter, with a number as to what he wants in the accounts that wants it in and on the December account statement there is a transaction that occurs before he first calls Mr. (indiscernible - D).

So just as in -- Your Honor, I think every case stands on its own but I think that that is comparable to some of the allegations that were against Robert Jaffe in the Cohmad case where the allegation that -- one of the allegations that Judge Rakoff focused on was an instance in which he sent a letter in to Madoff to BLMIS, said I want a loss of X amount. The allegation in the complaint then said Madoff executed that; BLMIS executed that through a backdated trade that yielded approximately the amount that Mr. Jaffe asked for.

And that was one of the facts that Judge Rakoff found was sufficient to establish that Mr. Jaffe, at least at the pleading stage, had actual knowledge because, again, Your Honor, the standard here -- and I know Your Honor is very familiar with the standard -- but at this stage, the standard is that he had actual -- that the defendants have actual knowledge that there were no securities transactions going on at least in their accounts or at least some of the transactions were not actual securities transactions.

Now, as we go forward or we move into discovery, obviously there will be disputes and we can take discovery on the broader issue but at least at the pleading stage we have satisfied that standard here both in terms of the guaranteed return, the manner in which the extra P&L was paid, the fact that Mr. Mendelow knew about that, the fact that he directed BLMIS on a yearly basis how much to pay him and where to pay it, the fact that it was always accomplished through backdated -- not backdated, Your Honor. Sometimes they backdated but always accomplished these fictitious (indiscernible) transactions.

And on top of that, Your Honor, he's coordinating with Mr. (indiscernible - D). From a macro level, Your Honor, we'd also point out the fact that if you look at the way that he treated these accounts, the way that he characterized his returns, he did not treat it as if it was

a securities trading account. He referred to his return in terms like interest and --

THE COURT: I read all that. So what? What does that mean?

MR. NEW: Well, Your Honor, it goes back to the very basics for the Safe Harbor. The Safe Harbor is to protect investors who have a legitimate expectation that there's securities trading going on in their accounts.

If somebody signs a securities contract with BLMIS as Mr. Mendelow did here, but at the very time that he signs it he knows, you know what, it doesn't matter what he trades in my accounts because he's giving me a fixed return as if it's a loan. He's giving me an extra amount. The securities transactions are irrelevant.

Well, we would argue, Your Honor, that that shows that he does not have a legitimate expectation like an innocent investor would that BLMIS was actually trading securities in those accounts. But he believes that Madoff is just giving him money year after year in a preset amount.

He's giving him value that he then has the opportunity and ability to withdraw and turn into cash, which is exactly what he did here. He and his family withdrew over $11 million more than they ever put into their accounts and this spanned the course of 15 years.

In fact, if you look at the IRA accounts, there's

some statistics we have in the complaint, Your Honor, where after the initial transfer into BLMIS -- those accounts were originally with A&B and he transferred them over to BLMIS -- they put in almost no money and they lived off the fictitious profits.

Again, that's something that is consistent with somebody who doesn't believe there's actually trading going on, that Madoff is just giving him value in his accounts, which he can then withdraw and use for his own purposes.

It would emphasize again, Your Honor, that at this stage it is the pleading stage. We would be entitled to all plausible inferences in our favor, that we believe that there's more than enough in this complaint based on the facts that we have added to the complaint, in addition to the facts that were originally in the original complaint to raise the inference that Mr. Mendelow had actually knowledge that there was no securities transactions going on in his accounts.

THE COURT: At his deposition to remove 2004 exam, I understand he took the 5th. But what's the most direct question he was asked regarding his knowledge that there were no securities being traded in his account or that the December true-ups for lack of a better phrase did not result from actual trading?

MR. NEW: Your Honor, as we allege, he took the

5th over 300 times.

THE COURT: Yeah, but --

MR. NEW: I know you don't have the specific --

THE COURT: I'm curious whether -- you're asking me to draw an inference and that's why I'm asking you whether he was ever asked a question did you know, basically, that there were no securities being traded in your account or some such (indiscernible)?

MR. NEW: Well, we did ask, Your Honor, that for example -- and this is on Page 81 of the transcript -- wouldn't you agree that it's impossible to have a guaranteed consistent rate of return on investments in the stock market? He took the 5th on that. Isn't it true -- and this is on Page 82 to 83 of the transcript -- and, Your Honor, we could always provide a copy of the transcript to the court. It is referenced in the complaint and so it is incorporated by reference. We did not want to burden the court with a lengthy transcript but we're happy to submit it if it would help the court.

On Pages 82 to 83, the question was asked, "Mr. Mendelow, isn't it true that you knew that fictitious option transactions were added to your BLMIS accounts in order to falsely meet the guaranteed rate of return that Mr. Madoff had promised you?" Answer, "I take the 5th," which is -- and there are others along those lines. "Isn't it true," --

this is on Page 85, "Isn't it true that fictitious option trades were added to your BLMIS accounts in order to provide you with the amount of the finder's fee?" "I take the 5th."

THE COURT: Okay.

MR. NEW: He was directly asked that, Your Honor. He was also directly asked about his relationship with Mr. Madoff whether he had personal contact with Mr. Madoff, whether he met him, spoke to him on the phone, whether he visited BLMIS' offices, whether he went to the 17th floor, all the things that the defendant now takes issue with us not specifying in the amended complaint he took the 5th on.

And Your Honor, apparently from the motion papers here, it sounds as if Mr. Mendelow will sit for a deposition if this case moves forward. So perhaps we'll be able to ask him those questions directly. There will be a full evidentiary record as to whether or not he had knowledge that these transactions were fictitious.

If there's a factual dispute, we can take it to trial and that's really what we're asking for at this stage, Your Honor, is the opportunity to continue on with this case, to proceed to discovery. And defendant's obviously have their theory of the case. They have their view of the facts.

At this stage, the trustee is entitled to have the allegations in the complaint treated as correct and true and

afterwards we can move on to discovery and have our factual dispute.

THE COURT: Another question, part of your case against the daughters is based on imputation --

MR. NEW: Yes, Your Honor.

THE COURT: -- of his knowledge. What facts do you allege to support imputation? I see general allegations that he controlled the accounts but I didn't see any specific allegations regarding actual transactions of the accounts.

MR. NEW: Yes, Your Honor. With regard to Cara Mendelow, on Paragraph 19, the proposed amended complaint alleges that Mendelow opened Cara's account for her with a check that was drawn on the C&P Associate's bank account. And he signed that check. Now, it also alleges that he directed -- and this is in Paragraph 175 -- that he directed contributions and withdrawals into the account or from the account.

THE COURT: Didn't I reject similar allegations in Shapiro (indiscernible)?

MR. NEW: I don't believe you did, Your Honor. You know, I'd have to go back and check Shapiro, but I believe that at this stage it's sufficient to say that at a fact, he directed contributions and withdrawals and he communicated with BLMIS on her behalf.

It's not a conclusory allegation that he managed the accounts. It's actually saying that he directed withdrawals, he directed deposits.

THE COURT: Did he get the statements. He alleged that he got the statements to those accounts?

MR. NEW: Your Honor, I don't believe that we do allege he got the statements. I'm not sure that we know at this stage to be honest with you, Your Honor.

THE COURT: I mean, there's a lot of things you don't know but through discovery you still have to put in a complaint.

MR. NEW: We're doing the best we can, Your Honor, based on the facts as we knew them at the time.

THE COURT: Okay. Was Mendelow asked any of those questions at the Rule 2004 exam in (indiscernible)?

MR. NEW: In terms of his daughters, Your Honor?

THE COURT: Yes.

MR. NEW: Your Honor, I'd have to review the transcript. I'm not prepared at this time to have the answer of whether he was or he wasn't.

THE COURT: Thank you.

MR. NEW: Your Honor.

MR. ARKIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. ARKIN: I'm Stanley Arkin and together with my

collages Alex Reisen. We're here to address the court. I am willing to have Mr. Reisen argue the case mainly but I'd like to make a couple of very brief general observations with Your Honor's indulgence.

THE COURT: Sure.

MR. ARKIN: Which I'll refer to on the record. There is this argument which my friend, Mr. New and company, makes. Somehow my firm, we were responsible for some terrible scheme to delay the progress of this case for some several years and that's our fault somehow that so much time went by during which, of course, Mr. (indiscernible - d), a key witness, died.

And somehow that should be held against us in respect to this motion. We never talk about the fact. We don't hear a thing about the fact. And by the way, I'd say they look well-fed, well-worked.

THE COURT: So does everybody in this courtroom.

MR. ARKIN: Absolutely. Well, it's America in a bankruptcy court. But these people have one of the most extraordinary primary lucrative cases in America for several years and the reason so much time went by I might suggest is not because we were hiding or we were somehow camouflaging ourselves. We were right there always available for communication.

And the reason is that they were busy and they had

bigger fish to fry, bigger people to go after and we were just, if you will, one of the smaller cases, not who we are. And it should not be held against us in any way that we as a defendant didn't energize the progress of this case.

THE COURT: I don't understand them to be saying that. It's in response to your argument that there's been undue delay. They argue that there's been delay on your side, also, and that's part of the reason.

MR. ARKIN: I'd like to point to is they could (indiscernible) at any time and the reason they didn't is really because they have nothing else to do. That's my point.

The second thing I should say -- again, it's just an anecdotal observation -- is that, sure, the issue is actual knowledge, which both in this jurisdiction here, in the criminal law, in any of our major (indiscernible), it's a very difficult concept. Actual knowledge would mean Mr. Mendelow knew -- to use their language in their brief -- that there was a house of cards, a complete fraud, Ponzi scheme.

Nobody remarks upon the notion or the fact that this very smart accountant, our client, Mr. Steven Mendelow, left a whole lot of money on the table. If he believed this was a house of cards which could blow up, turn into flames at no time at all as it was based on nothing but fraud, why

would he have left his money there?

I think there should be some inference there in our favor. In any event, Mr. Reisen, will (indiscernible). Thank you for your indulgence.

THE COURT: Mr. Reisen will rise. Thank you very much.

MR. ARKIN: Thank you.

MR. REISEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. REISEN: Alex Reisen for defendants. I'd very much like to address the specific points Mr. New has raised but so why don't we just jump into that and then I'll sort of step back?

I guess I'm most concerned about the 5th amendment argument right now. I just -- none of those -- first of all, I believe he took a total blanket 5th amendment on all of this stuff.

THE COURT: Well my understanding is you have to be asked the question.

MR. REISEN: Understood, understood. But yes, to all of them. It wasn't like -- so also we know in Jaffe you may draw an inference. If so, it's weak. Anyone could be drawing --

THE COURT: But for the purposes of -- it really comes down to for the purposes of a motion to dismiss, if

he's asked the $64,000 question did you know and he says I take the 5th, why can't I draw the inference at least for pleading purposes and maybe for trial purposes that he did?

MR. REISEN: Well, I think because you're allowed to take the 5th and I think he's worried about waiver among other things. If he says no to this, well, what else can you answer about it? So I mean, I really don't think there's any precedent.

The trustee doesn't -- first of all, none of those are in the proposed amended complaint. None of it is in their briefing. We're totally caught off guard.

THE COURT: Well, they do allege that he took the 5th and I think I can look at that transcript.

MR. REISEN: Okay. Fair enough.

THE COURT: And they rely on it for that matter.

MR. REISEN: Fair enough. So let's also talk about Mr. New's first statement was legitimate expectations. It doesn't protect -- that's actually not the standard. We knew Merkin knew that there was a high degree of probability.

THE COURT: Let me stop you on that.

MR. REISEN: Sure.

THE COURT: There is a difference between receiving high returns ever year even when the market is going down and being told before you put your first dollar

in really don't worry you're going to make 17%. That's a distinction that you have to draw.

MR. REISEN: Fair enough. Okay. So let's -- their claim --

THE COURT: I don't think Merkin has anything to do with this case. It's more of a Shapiro type case. It's not a typical red flag case. It's a case where the argument is he actually participated or conspired with BLMIS management to create these fictitious profits.

MR. REISEN: We actually don't agree that there's any factual allegations of any such thing. I think it's only inquiry notice and it's all speculation.

Let's go back to Twombly. Twombly says non -- you cannot draw non-speculative inferences, not just plausible. But this is all pure speculation based on inquiry notice. Even if Mendelow saw these specific trades, saw this, then took the next step and realized, oh, this is a red flag, even -- neither of those two things are alleged. Even then, there would be a dozen different things one would assume rather than no securities trades.

THE COURT: So how do they allege actual knowledge if every fact they allege simply puts them on inquiry notice?

MR. REISEN: Well, we can talk about some of the times that you do, but there's -- but it's among the

specific facts you must plead a strong inference, specific facts that are with particularity that draw a plausible non-speculative inference.

And, so yes, obviously it would be great if you say I knew it but there -- also, all of this stuff is pure inquiry notice. We can go through the different facts that are alleged and I'll tell you why it's pure speculation and pure inquiry notice and does not draw that non-speculative inference.

Let's go straight to the guaranteed returns because that seems to be an issue. Their claim is that could never be done in a real securities market.

Now, first of all, of course, the assumption is, yes, like you said, like we talked about last time, you can just, as he's got a huge, you know, stable -- he's the biggest market maker of (indiscernible) allocates when he trades the same way he does with the extra P&L. But there's --

THE COURT: Slow down.

MR. REISEN: Sure, sure.

THE COURT: Go ahead.

MR. REISEN: So there's also another way that you can do it and a very simple example. You know, Mendelow bears the risk. He's got multibillion dollar bank rolls. He sells options for $1000 that a one in a thousand event

occurs. He sells, you know, 432 of them. If the long shot comes in, Madoff pays it off. He just bears the risk. That's the exactly the way. There's an infinite numbers of ways you can "guarantee" returns.

So if you had said that -- or he could just -- you could just guarantee something. Everyone guarantees things and, you know, if -- maybe he'll have just -- it would be wrong and he'll just default.

But the bottom line is it's not a non-speculative inference if you're told you'll get a guaranteed return that all of a sudden you have actual knowledge. That is such a high bar of such a narrow fact you believe that there is no securities trading.

The SEC, everyone who had thought it back in '92, guaranteed returns, it's on the TV special, guaranteed returns.

THE COURT: Where is that in the complaint? I'm looking at the complaint. It sounds like you're going outside the complaint.

MR. REISEN: Sure. Well, let's talk about just is it a non-speculative -- and this was in the original complaint, by the way.

THE COURT: Well, for instance, and that's why I asked Mr. New what allegations were in the complaint. And the substance of what he says, what the complaint says is

every December Mendelow computed what he needed to get to his number. He would contact (indiscernible - D). He would say this is what I need. This is what I'm entitled to. This is how I want you to divide it up and then magically that number would show up in the December statements as options transactions, profits from option transactions.

Why doesn't that tell them these are not legitimate trades? They're just constructed in order to give me what I'm --

MR. REISEN: It might be.

THE COURT: So why isn't that a reasonable inference?

MR. REISEN: It's not alleged that he ever looked at any of these statements. It's alleged that -- it doesn't even contemplate. First of all, it's only alleged that he did this twice.

Second of all, he just -- he knows his absolute balance. He doesn't even need to look at one single transaction. He knows his balance times 17% and he knows his --

THE COURT: This is a guy who looks at everything, at least the way that it's alleged. He's marking up documents. He's communicating. He's obviously looking beforehand at his statements in order to be sure in terms of what he's entitled to. So you don't think he's looking at

it afterwards to see that he'd gotten what he's asked for.

MR. REISEN: Well, let's look at actually what's written there. There's only two calculations and the actual scan. There's two things. It says 17% times the absolute amount, all you have to look at is the balance. He never necessarily even saw any of -- whether it was option transactions.

THE COURT: Isn't it reasonable to infer that he looked at the statements given the meticulousness with which he examined them in order to be sure that he got what he was entitled to?

MR. REISEN: That is not a non-speculative inference to say that because he, Mendelow, who is alleged to be a diligent worker, that he looked at the balances, looked at everything, cross checked it against things and came to actual knowledge.

THE COURT: -- that he looked at these statements, would you say that's a conclusory allegation?

MR. REISEN: But all -- remember, they made with particularity, they cannot allege that he looked at any particular transactions. What they allege is that he looked at the statements. They're very careful. If they could allege that he looked at a particular transaction, if there was any evidence ever over 20 years that he ever looked at one, they would say it.

All he said is that he reviewed his overall transactions. The only thing he needed to do was look at the balances and that could easily -- and clearly the inference is that he allocates the amount of that Bernie Madoff bears the risk.

Now, remember, it's not is it plausible to say Mendelow maybe had some suspicion but never -- this is really a continuum. We've got the actual receipt of the red flag (indiscernible) something that's -- then there's actual looking at it. Then there's actual that there's some suspicion. Then there's Merkin. There's high risk. But then there's high degree of certainty that no securities traded.

To come to that conclusion, I mean -- I just want to step back for a second. I feel like we lose the forest for the trees. My wife is ex-securities attorney. She now works for a nonprofit. She said --

THE COURT: I think you're going outside the record.

MR. REISEN: Understood. Fair enough. That is definitely not put in the complaint. But the idea is -- and she said, well, you know, what is the standard? I said actual knowledge that no securities were traded. She said, well, how can you do it? Everyone's jaw dropped. That's not supposed to be possible. That is not a non-speculative

inference that Mendelow concluded with a high degree of certainty.

He might have had some suspicions but that's not the standard. A high degree of certainty, not that there's some --

THE COURT: Are you citing her as a source, like (indiscernible) or is this --

MR. REISEN: Well, I'll tell you --

THE COURT: I mean, I appreciate her views. But --

MR. REISEN: Okay. I'll tell you why because when you look at a complaint and a judge loses all of his context and -- is what is it? That's sort of the standard of Twomby, right? That you --is this a plausible inference? Not that he had some suspicion or that it looked like there was something wrong, but a high degree of certainty that there were no securities traded, not some securities traded or there was something fraudulent or even actual knowledge that there was crimes going on. That's not enough.

That there was this totally unprecedented, every institution failed, it's unthinkable. And to have a high degree of certainty of that? No way. So let's talk about some of the other -- so the IRA.

So they say -- first of all, again, not allege that he ever looked at any of these cash balances. We're

just talking about inquiry knowledge. But even if he did, their reasoning is totally contradictory.

First, you need to hold two contradictory facts in your head, first that Mendelow and Madoff are such law abiding citizens that they would never allow -- the tax regs of allowing cash contributions or margin trading or securities additions. And at the same time they're the biggest master criminals in the world. They all know it and they all participated in it.

So why -- of course the inference is if he had ever seen it, which is not alleged, he would just assume, yeah, he's trading on margin. He's not supposed to be doing it. So, you know, it's just -- that is not a non-speculative inference to draw from, from the IRAs.

So and of course the one backdated transaction which they can find out of the millions, he's not allowed -- he's not alleged to have ever seen it, so it's an inquiry knowledge. But second of all, the way this was allocated, it was always some certain. So (indiscernible - d) would have known exactly the amount and the trades would have happened already. The only question is where to allocate it.

Now, I want to be very clear. Mendelow calculated it twice right at the beginning. He did a very simple calculation, a percentage times a total amount plus a

percentage of the referred customers. So that's all he did, twice. And he said that he wasn't constantly going through -- and then the only other thing he calls in December, he says I want my $432 million put here and here. He's not alleged to have ever seen how it's done. All he needs to look at is the balance. It's not even a necessary step to look at any particular trade.

That is not a non-speculative inference to draw that. Because he did that, he said pay my referral fees and of course they're referral fees, by the way. It's Madoff -- it's based on a percent of the amount given back. Madoff wants to incentivize him to get some more money in. Of course it's a referral fee. It's not some secret way to get fictitious profits.

So we can certainly go back to all the particular allegations here for futility and there's lots more to talk about. But I also would like to talk about the undue delay and the prejudice. I understand it's a liberal standard. It's not usually granted. This is (indiscernible) quintessential case for both undue delay and prejudice.

First, undue delay. It's been six year since the claim, five years since (indiscernible - c). When (indiscernible - c) came out, they knew unless they can allege actual knowledge, every claim is dismissed except for claim one.

You asked me last time, well, why weren't we allowed to wait, too? The key distinction besides it being their burden is that we had no idea that this was even an option, that it was even possible. We thought it was privileged. We didn't know the possibility of amending.

THE COURT: -- possible.

MR. REISEN: We thought the choice was if (indiscernible - c) is affirmed, all the claims get dismissed. This complaint that we were facing was a pure inquiry notice. There was no even a single conclusory allegation about anything having to do with no actual securities trade or anything like that.

So we didn't know that we're waiting to see if they were to amend the complaint and we were consenting to allow them wait and see what they would allege about subjective -- we never knew it. And that's proven by even after -- okay so Fishman is affirmed in December. January they do their case management order. They say we're not going to amend.

February we have a conference. I say none of your claims are viable. We're going to move for judgment on the fees unless we can come to a settlement, we reach a settlement on this. It doesn't seem like there's -- don't even mention any possibility of amending any new allegations. Now, (indiscernible - d) is still alive at

that point.

And then in May we have a meet and confer. We say, well, how is it possible, even plausible, non-frivolous for you to allege anything not actual knowledge? They refused to -- "we will not engage in a discussion about the facts of the law."

Then in June, it's the Supreme Court denies cert, the purported reason absolutely no possibility. They still don't amend, give us any notice. The first time we hear about it is in the opposition in August of 2015. And even in December they will not tell us what possible allegations are out there.

The standard is it has to be a -- it is their burden to not delay when they have the facts once they know of the pleading deficiencies. We're telling them. We're saying, what is it? They won't even engage with us about telling the -- so that's undue delay.

Now prejudice, I mean, (indiscernible - d), he threw everyone under the bridge.

THE COURT: But it sounds like it hurts the trustee's case more than your case. (indiscernible - d) was the guy who was going to put Mendelow in a room with him, literally, not figuratively. And now the only person who's a witness to anything is Mr. Mendelow, right?

MR. REISEN: Yeah. It's not our obligation. The

trustee's --

THE COURT: How is the trustee going to prove his case?

MR. REISEN: We want (indiscernible - d) as our affirmative case? (indiscernible - d), probably we want to say to him, isn't it true that the prosecutors said you need to tell us everything about everyone who had actual knowledge or else you're going to lose your deal? Yes. Did you tell everyone, even people that you cared way more about than Mendelow? Yes. Did Mendelow know? No.

Would you have lost everything if you had lied and you know that Mendelow knew and you didn't say Mendelow -- all of this stuff. What did you understand on that thing you do, which of course means the real -- you know, on that thing where you pay me referral fees -- what did that mean? We know that you --

THE COURT: But can't Mendelow testify to all that?

MR. REISEN: He can but he's biased against himself. (indiscernible - d) is biased the other way. It's additional key evidence.

THE COURT: But even if he's biased, if they have the burden of proof who are they going to call to prove the facts in their complaint, now that Mr. (indiscernible - d) is dead?

MR. REISEN: Well, it's not just that. Obviously that's not the only factor. If that was the only factor at issue, Mendelow says no and they don't have this other stuff, then maybe. But we need (indiscernible - d). (indiscernible - d) can win the case for us. He would tell us I have all the -- I knew who knew. These are all the reasons. I knew everything. I did everything to hide it. This is how I hid it from Mendelow.

THE COURT: That sounds pretty speculative. Any evidence that he would testify to that?

MR. REISEN: Sure. I mean, yes. If you looked to -- well, firs to fall, like I said, of course he totally opens his books, you know, his mind of everything he knows to the prosecutor. He says nothing about Mendelow knowing anything. He says about how he was successful in hiding it from people. He would have -- I'm sure but if you look at the testimony and --

THE COURT: How do you know what he said to the prosecutor?

MR. REISEN: Well --

THE COURT: He had a transcript of his testimony at trial. How do you know what he said to the prosecutor?

MR. REISEN: We know what he would say because we know Mendelow didn't know. We're entitled --

THE COURT: I don't know what he said.

MR. REISEN: Yes, but we're entitled to not be prejudiced to have that opportunity. If they undue delay without excuse and we're prejudiced, we need that opportunity to ask him, to say, look, (indiscernible - d), tell me all the reasons why you know that Mendelow didn't know.

THE COURT: So why didn't you take his deposition when --

MR. REISEN: Because we had no notice that they would ever make such a -- what we view as a frivolous allegation. We were even, again, saying how are you going to make your case? Now, they never we're going to (indiscernible) actual knowledge, that we're going to talk about (indiscernible - d). We're going to -- we had no -- you know, we don't -- we can't just burn fees. We can't just also prove that Mendelow's (indiscernible) a blank check of $1 billion.

But, I mean, why didn't we take (indiscernible - d)'s deposition? We had no notice that that was even going to be necessary. We found out after he was dead. Of course we would do it now. But he was dead.

We were telling them please explain to us. It's our understanding that this is -- the case is over. See what our understanding was going up to (indiscernible - c) was not that they would amend once (indiscernible - c) was

affirmed but that once (indiscernible - c) was affirmed by the complaint that we're seeing we would settle or it would just be the first case.

We had no idea an amendment was a possible to plead actual knowledge. We thought that that would be frivolous, unethical. So we can't assume that they will do something that we view objectively as an unethical matter and start billing our client for taking depositions of people about a possibility. So that's that.

So let's go back a little bit to the futility.

THE COURT: Why don't you wrap it up? You've shown --

MR. REISEN: Sure, fair enough. Let me think if there's important stuff? Well, let's think about Jaffe, too, because that was mentioned.

Now, this same allegations against Jaffe without the amended complaint in Cohman 1 was made and it didn't even raise the inference of recklessness, the fact that he would call back and say --

THE COURT: The motion was denied in Cohman 2.

MR. REISEN: Cohman 2. Now, let's distinguish Cohman 2. First of all, it shows that -- so Mendelow, again, no evidence of subjectivity of him saying go do a backdated trade. Go execute -- he just says pay me my referral fees and however you do it.

And now Jaffe "executes" a backdated trade. He says go give me some long-term gains in my account which necessarily means it's his account, which necessarily means he's committing tax fraud. Also the perfect control is that those allegations were not made against the other Cohman defendants. So that actually necessarily had no weight on the Jaffe decision because the other defendants didn't have that.

THE COURT: The backdating (indiscernible) had no weight in the Cohman 2? That was the basis of deciding the actual knowledge.

MR. REISEN: Well, I guess I'm saying that the -- well, I thought Cohman 2 had other defendants and that was a delay against --

THE COURT: Yeah, the defendants were in -- they were Madoff's partners and they had a separate set of books and records in Madoff's case.

MR. REISEN: Fair enough. I guess not that it had no weight but not necessary weight.

THE COURT: I think it was the ratio (indiscernible) decision.

MR. REISEN: Okay. Well, let's be very clear about there was no allegation of any knowledge of backdating on Mendelow, that the fact is is that, first of all, there's no allegation that he ever saw this backdated trade, that he

ever directed it, ever had knowledge of it. It's pure inquiry notice.

Also, even if he did see it, there's no necessary -- certainly, no non-speculative inference that you get to a high degree of certainty of no securities traded that you would have had to have backdated.

Again, he knows the exact figure that you're going to have to give Mendelow. The only thin Mendelow does is say where he wants it. There was only twice where he calculated the fees. It was just a pure percentage times an amount. No necessary -- then again, after that, all he did was call and say, look, (indiscernible), which accounts? This one and that one. That's all. There was no necessary looking at any particular transactions. And, indeed, that is not -- they are no able to non-frivolously allege that.

All they can say is that he looked at his account statements because that's the only thing that's shown by both those PDFs and by the necessary calculations that he did the total times the percentage. Nothing having to do with the subjectivity, nothing even close to the relationship like in Shapiro or Cohman where they're (indiscernible) hundreds of times.

Mendelow never went to BLMIS. He never met him. Maybe spoke to him once. They say that he contacted him. I don't know whether that was an email, was a letter. That's

the most. He didn't talk to anyone, Madoff or anyone about the inner workings of BLMIS.

So if the court has any other questions, I'll just leave it at that.

THE COURT: Okay. Thank you.

MR. NEW: Your Honor, I'll be very brief. First, I just want to point out that with regard to the issue of Mr. (indiscernible - d) and some of the timing of when they were on notice, you know, as we point out in our reply brief, Mr. (indiscernible - d) was identified in the original complaint as a participant in the fraud. That was at Complaint Paragraph 32.

Mr. Mendelow was specifically asked about his interactions with Mr. (indiscernible - d) at his rule 2004 deposition. And Mr. (indiscernible - d)'s trial testimony he specifically mentioned Mr. Mendelow as a person who received a double benefit.

And also, Your Honor, as Mr. Reisen mentioned briefly, there was a case management order that the parties agreed on in this case in January. It wasn't something we submitted. We both stipulated to it.

We exchanged initial disclosures in the end of January 2015 and one of the potential witnesses for the trustee identified in those initial disclosure was Mr. (indiscernible - d), so and that was several months before

he passed away.

But, again, they have had notice of Mr. (indiscernible - d) relevance to this case for quite some time, so that really is a red herring here.

Quickly on some of the other points, Your Honor, I would point out that, you know, when it comes to the issue of how he was being compensated with this extra P&L and what he knew, a lot of what Mr. Reisen just stated here was theory, speculation, alternative facts, as Your Honor pointed out, that are not in the complaint.

Obviously they can pursue those theories, they can try to develop those facts in discovery but the complaint as it stands right now makes it very clear how Mr. Mendelow received this extra P&L. It was through these fictitious option transactions. There were no allegations that -- and I'm not aware of any facts that suggest that Mr. Madoff or BLMIS had some other pool of securities that they somehow allocated into his account. There's nothing in the complaint that supports that.

And I would point out, Your Honor, that what the complaint does say very clearly is that on the account statements and in Mr. Mendelow's own handwritten calculations, there were no securities that were contributed to his account. So it's simply not the fact based on the allegations in the complaint which need to be accepted as

true at this point, that Mr. Mendelow could have believed that he was getting securities transferred into his account that were coming from some other source because there's no evidence that that actually happened either on his account statements or in his own calculations.

In any event, the question before the court at this time is whether this is a plausible inference that Mr. Mendelow knew that these were fictitious option transactions in his accounts, not whether it's the only plausible interest, not whether it's the most plausible inference, but whether or not the facts alleged and the inferences to be drawn from them raised a plausible claim for relief. Discovery can sort out the rest of it.

With regard to the IRA, Your Honor, I don't think that Mr. Reisen quite understands what the argument is here. I assume that the court does.

The argument is not that there were margin trades in the account. It's not that he should have looked at the statements and seen that there were margin trades in the account. The argument is is that he specifically directed that he be getting extra value in his IRA accounts in a preset amount, that that was accomplished through fictitious option transactions and that was the only way that it could have been accomplished, through gains on transactions.

Mr. Mendelow is a sophisticated accountant; he's a

sophisticated financial professional. The allegations in the claim are sufficient to show that he knew that he was being compensated at his direction, at his request in transactions in that account.

And finally, with regard to Jaffe, Your Honor, I don't want to beat a dead horse, but --

THE COURT: But you will.

MR. NEW: Yeah, I will, just very briefly just to provide citations to the court in case the court doesn't have it.

In the actual Cohman decision, 2013 US District Lexis 56042 at 38 to 39, the allegations that were relied upon by Judge Rakoff are that Jaffe request to Madoff Securities "a long-term gain of approximately $600,000 for one of the accounts he controlled in response to which Madoff Securities executed a sale of Etna stock on the day before the request." That's the sum total of the allegations and that's comparable to what we've alleged here with regards to that one backdated trade.

Unless Your Honor has any further questions about the amendment, I would just like to briefly raise the housekeeping matter that's also on the calendar for today.

THE COURT: Go ahead.

MR. NEW: You know, the parties have discussed this prior to court today and I believe that we've agreed on

a stipulation that we'll submit to the court this afternoon which will ask the court to so-order the stipulation that the case management -- the dates in the case management order are being held in abeyance pending the court's determination on this motion and the defendant's motion and that upon determination by the court on those motions the parties will agree upon new dates to be proposed to the course in an amended case management order.

THE COURT: All right.

MR. REISEN: If I may just address what he said.

THE COURT: No. I'll reserve decision. But what I would like is a copy of the 2004 transcript and those questions and answers you want me to read.

MR. NEW: Yes, Your Honor. We will do so.

THE COURT: And you can tell me any questions and answers you want me to read also, Mr. Reisen. Thank you very much.

MR. NEW: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 12:07 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

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